CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY & NFP LAW BULLETIN NO. 479

OCTOBER 29, 2020

EDITOR: TERRANCE S. CARTER
ASSISTANT EDITORS: NANCY E. CLARIDGE,
RYAN M. PRENDERGAST AND ADRIEL N. CLAYTON

SUPREME COURT AWARDS OVER $1M DAMAGES FOR PAY IN LIEU OF NOTICE

*By Barry W. Kwasniewski**

A. INTRODUCTION

EMPLOYERS WILL have to write strictly worded and legally precise termination clauses if they aim to exclude entitlements to financial incentive bonuses for executive employees who have recently left their company. In *Matthews v Ocean Nutrition Canada Ltd.*, a judgment rendered on October 9, 2020,[1] the Supreme Court of Canada ("SCC") restored $1,086,893.36 in damages, for payment in lieu of notice, awarded in a 2017 trial to a former employee as a result of a Long Term Incentive Plan ("LTIP") agreement with his employer.[2] The SCC overturned the 2018 Nova Scotia Court of Appeal's holding that excluded the LTIP payment,[3] and the issue pivoted on whether that money would be included in a reasonable notice period at common law, considering the terms of the employment contract. This decision is relevant to charities and not-for-profits that include bonus and incentive programs as part of employee compensation.

B. BACKGROUND

DAVID MATTHEWS worked for Ocean Nutrition Canada Ltd. ("Ocean"), a Nova Scotia company, starting with its founding in 1997 as a chemist, and by 2007 occupied a senior management position as Vice President of New and Emerging Technologies — when friction began with a new Chief Operating Officer. Over the next few years, Matthews' position in the company became increasingly marginalized until he

* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters' Ottawa office. The author would like to thank Martin U. Wissmath, Student-at-law, for his assistance in preparing this *Bulletin*.

[1] 2020 SCC 26; appeal heard October 8, 2019 [*Matthews*].

[2] *Matthews v Ocean Nutrition Canada Ltd.*, 2017 NSSC 16, [2017] NSJ No 32 (QL) ["Trial"].

[3] *Ocean Nutrition Canada Ltd. v Matthews*, 2018 NSCA 44, 48 CCEL (4th) 171 ["NSCA"].

finally left in 2011. Ocean had proposed the LTIP agreement, to which Matthews agreed, in 2007, as both a reward for senior management employees who had contributed to the value of the company in the past and an incentive to retain their expertise for further contributions in the future.[4] Although he had discussed a severance package with management, there was no agreed "exit strategy" by the time Matthews left the company.[5]

In 2012, about 13 months after Matthews' departure, Ocean was sold for $540 million, which constituted a "'Realization Event' for the purposes of the LTIP, thus triggering payments to employees who qualified under the plan."[6] However, because Matthews was no longer considered an employee of Ocean, he did not receive a payment, as the company "took the position that he did not satisfy the terms of the plan."[7] He subsequently sued Ocean for wrongful dismissal and oppression in the Nova Scotia Supreme Court, claiming that the company's conduct amounted to a breach of the employment contract and an unfair disregard toward his financial entitlement under the LTIP; he also claimed a breach of good faith and sought punitive damages.

The Trial judge applied the two branches of the test from *Potter v New Brunswick Legal Aid Services Commission* to find that Matthews had been constructively dismissed.[8] Because of the company's substantial reduction of his responsibilities, and his position having become increasingly ostracized, the Trial judge found that Ocean "evinced an intention" to no longer be bound by the terms of the employment contract.[9] The Trial judge held that Matthews was entitled to 15 months' reasonable notice, and because he would have still been an employee when the company was sold, he was also entitled to the LTIP, amounting to a total of $1,086,893.36. For that reason it was unnecessary to rule on the oppression issue.[10]

However, on appeal, the majority judges of the Nova Scotia Court of Appeal ("NSCA") did not agree that Matthews was entitled to the LTIP damages. According to them, the terms of the LTIP agreement were clear, in particular clauses 2.03 and 2.05:

---

[4] *Matthews, supra* note 1 at para 15.
[5] *Ibid* at para 17.
[6] *Ibid* at para 18 ["Realization Event"].
[7] *Ibid*.
[8] 2015 SCC 10, [2015] 1 SCR 500; *ibid* at para 20.
[9] Trial, *supra* note 2 at para 353.
[10] *Matthews*, *supra* note 1 at paras 23–25.

> 2.03 CONDITIONS PRECEDENT
>
> ONC shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of ONC. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of ONC, regardless of whether the Employee resigns or is terminated, with or without cause.[11]
>
> 2.05 GENERAL:
>
> The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of the Realization Event and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation.[12]

In the majority judges' view of the NSCA, the language of the LTIP was "plain and unambiguous" and excluded Matthews from payment in connection with his "resignation or in any severance calculation."[13] They ordered him to repay "any amount received under the Long Term Incentive Plan, any interest paid thereon and any costs paid by Ocean Nutrition as a result of the decision below."[14]

In his dissent, Justice Scanlan of the NSCA focused on the bad faith conduct of the Chief Operating Officer, reasoning that the "LTIP does not contemplate a rogue manager arriving on scene and embarking upon a campaign to undermine, and root-out, a valued long time employee, resulting in the loss of LTIP benefits."[15] Based on the rationale in *Bhasin v Hrynew*,[16] Justice Scanlan found an implied term to perform both the employment contract and the LTIP with honesty and integrity, which the Chief Operating Officer violated through "lies, deceit and manipulation."[17] Ocean should be held liable for damages as a result of Matthews' loss of the LTIP payment, according to the dissent.

Matthews sought leave to appeal to the SCC, which was granted.

---

[11] Trial, *supra* note 2 at para 65.
[12] NSCA, *supra* note 3 at para 59.
[13] *Ibid* at paras 72–74.
[14] *Ibid* at para 112.
[15] *Ibid* at para 146.
[16] 2014 SCC 71, [2014] 3 SCR 494.
[17] NSCA, *supra* note 3 at para 168.

C. ANALYSIS

ALTHOUGH THE parties and intervenors argued for development of existing laws, namely “an extension of good faith and narrowing of the duty of reasonable notice,” the SCC decided that “existing common law principles” were sufficient to dispose of this appeal.[18] Accepting that Matthews’ constructive dismissal and entitlement to reasonable notice was no longer in dispute, the issue to be decided was whether he was legally entitled to the LTIP.[19] On this point, the SCC did not agree with the NSCA that the LTIP was “unambiguous” enough to remove Matthews’ common law rights. Confirming precedent set by the Ontario Court of Appeal in *Paquette v TeraGo Networks Inc.*,[20] the SCC distilled the analysis into a two-part test for wrongful dismissal claims involving financial bonuses or benefits in an employment contract:

> Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?[21]

1. <u>Would Matthews have been entitled to the LTIP as compensation during the reasonable notice period?</u>

It was “uncontested” in the final appeal that the Realization Event[22] occurred during Matthews’ 15-month reasonable notice period.[23] The purpose of pay in lieu of notice is to put the employee in the position they would have been in if they had continued working and receiving payment through until the end of the reasonable notice period. “But for” his dismissal, according to the SCC, Matthews would have received the LTIP payment. Therefore, following established common law principles, Matthews was *prima facie* entitled to receive damages to compensate for the loss of the LTIP.[24]

2. <u>Did the LTIP agreement unambiguously remove or limit Matthews’ common law right?</u>

Provisions of an agreement — such as a termination clause — that purport to limit an employee’s common law right to pay in lieu of notice, especially in the case of a unilateral contract — such as the LTIP — with terms that are not negotiated by the parties, must be “absolutely clear and unambiguous,” the SCC

[18] *Matthews, supra* note 1 at para 4.
[19] *Ibid* at para 3.
[20] 2016 ONCA 618, [2016] OJ No 4222 (QL).
[21] *Matthews, supra* note 1 at para 55.
[22] *Supra* note 6.
[23] *Matthews, supra* note 1 at para 59.
[24] *Ibid* at paras 59–60.

declared.[25] Clause 2.03 of the LTIP agreement failed that test. Language requiring an employee to be "full-time" or "actively employed" is not sufficient to remove the right to payment in lieu of notice as an employee would indeed be actively employed full-time through the reasonable notice period if he had been given proper notice of his dismissal.[26]

Clause 2.03 also failed to unambiguously limit Matthews' common law right to reasonable notice in its wording of termination "without cause." Following an earlier precedent in *Bauer v Bank of Montreal*, the SCC affirmed that exclusion clauses "must clearly cover the exact circumstances which have arisen."[27] The LTIP agreement would have needed to specify circumstances of unlawful termination without notice; however, since the employment contract is not finally terminated until the end of the reasonable notice period, even language clearly stating unlawful termination without notice would not be entirely sufficient to exclude common law rights.[28] In other words, language covering the exact circumstances of dismissal would be a necessary, but not a sufficient, condition for a termination clause to limit or remove the common law entitlement to reasonable notice or pay in lieu. The SCC did not explicate precisely what additional language would be sufficient to that end.

As for clause 2.05 of the LTIP agreement, the SCC agreed with the dissent in the NSCA (Scanlan J), and distinguished pay in lieu of notice from severance pay. The former are damages provided to an employee who has been wrongfully dismissed, to compensate them for lost payment and the timely opportunity to seek alternative employment.[29] Severance pay, on the other hand, "acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates,"[30] and is usually covered by provincial employment standards legislation, such as the *Employment Standards Act, 2000* in Ontario.[31] As such, clause 2.05 was neither relevant nor effective to exclude Matthews' common law entitlement to reasonable notice. Further, as clause 2.05 stated that it did not have any "current or future value other than on the date of the Realization Event", Matthews would have received the full value of the LTIP, because if he "had been properly given notice of termination, he would have remained a full-time employee on the date of the

[25] *Ibid* at paras 64–65.
[26] *Ibid* at para 65.
[27] 1980 CanLII 12 (SCC), [1980] 2 S.C.R. 102 at 108.
[28] *Matthews, supra* note 1 at para 66.
[29] *Ibid* at para 69.
[30] *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 at para 26.
[31] *Matthews*, *supra* note 1 at para 69; S.O. 2000, c. 41 ["ESA"].

Realization Event, and thus would have received an LTIP payment. His damages reflect that lost opportunity."[32]

D. CONCLUSION

WHILE CHARITIES and not-for-profits are unlikely to offer their employees similarly generous LTIP agreements, this case is important for all employers to note, given the high bar raised for termination clauses in relation to excluding bonuses or incentive payments from termination compensation. As the SCC described, any employment contract or agreement contingent on employment that purports to exclude an employee's common law rights to reasonable notice must be precise and comprehensive, stipulating the exact circumstances of dismissal. Even with that necessary language in place, there is no guarantee that the courts will find it sufficient to exclude an employee's common law rights to damages for pay in lieu of notice, which are significantly higher for long-term employees than the statutory minimums in Ontario and other provinces provided under the ESA or employment standards legislation in other jurisdictions.

CARTERS

Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trademark Agents / Avocats et agents de marques de commerce
Toronto · Ottawa · Orangeville
www.carters.ca   www.charitylaw.ca   www.antiterrorismlaw.ca
Toll Free: 1-877-942-0001

DISCLAIMER: This is a summary of current legal issues provided as an information service by Carters Professional Corporation. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation. © 2020 Carters Professional Corporation

00509077.DOCX

[32] *Matthews, ibid* at para 70.